POLICE DEPARTMENT CITY OF NEW YORK

December 4, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Abraham Badillo
Tax Registry No. 936162
71 Precinct
Disciplinary Case Nos. 2014-12809 & 2014-12814

Charges and Specifications:

Disciplinary Case No. 2014-12809

1. Said Sergeant Abraham Badillo, on or about July 25, 2013, at approximately 0650 hours, while assigned to the 69th Precinct and on duty in the vicinity of inside of East 105th Street L Train station, Kings County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he participated in the search of John Turner's bag without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT – PROHIBITED CONDUCT

Disciplinary Case No. 2014-12814

1. Said Sergeant Abraham Badillo, on or about August 15, 2013, at approximately 0745 hours, while assigned to the 69th Precinct and on duty in the vicinity of inside of East 105th Street L Train station, Kings County, abused his authority as a member of the New York City Police Department, in that he stopped John Turner without sufficient legal authority.

   P.G. 212-11, Page 1, Paragraph 1 - STOP & FRISK

2. Said Sergeant Abraham Badillo, on or about August 15, 2013, at approximately 0745 hours, while assigned to the 69th Precinct and on duty in the vicinity of Inside of East 105th Street L Train station, Kings County, abused his authority as a member of the New York City Police Department, in that he frisked John Turner without sufficient legal authority.

   P.G. 212-11, Page 1, Paragraph 2 - STOP & FRISK

3. Said Sergeant Abraham Badillo, on or about August 15, 2013, at approximately 0745 hours, while assigned to the 69th Precinct and on duty in the vicinity of Inside of East 105th Street L Train station, Kings County, engaged in conduct

prejudicial to the good order, efficiency, or discipline of the Department, in that he searched John Turner's bag without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Appearances:
For CCRB: Suzanne O'Hare, Esq.
For Respondent: John D'Alessandro, Esq.

Hearings Date (s):
July 14, July 23 and September 1, 2015

Decision:
Guilty of all Charges and Specifications

Trial Commissioner:
ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 14, July 23 and September 1, 2015. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called John Turner, Joseph McClure and Police Officer Quentin Saxon as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find as follows: in Case # 2014-12809, Respondent is found Guilty of the Specification. In Case # 2014-12814, Respondent is found Guilty of Specifications 1, 2, and 3.

FINDINGS AND ANALYSIS

Disciplinary Case # 12809-2014

In this case, Respondent is charged with searching John Turner's backpack on July 25, 2013, without sufficient legal authority.

It is not disputed that on July 25, 2013, Respondent was on duty in the 69th Precinct, as the supervisor of a Street Narcotics Enforcement Unit (SNEU) team, in the area of the 105th Street "L" train station. At about 0730 hours, Respondent and members of his team stopped Mr. John Turner, who uses a cane, on suspicion of engaging in a drug transaction. During that interaction, Respondent learned that Mr. Turner had a bottle of prescription pills in his backpack. The pill bottle bore a prescription label in Mr. Turner's name. Mr. Turner was not arrested and was permitted to leave at the conclusion of the interaction.

What is in dispute in this case is the manner in which Respondent discovered the pills in Mr. Turner's backpack. Mr. Turner testified that Respondent, without his consent, took his backpack, opened it up and removed the pill bottle from it.

Respondent testified that Mr. Turner voluntarily proffered the pills and that he never searched the backpack.

I find that Respondent did search Mr. Turner's backpack without sufficient legal authority.

Mr. Turner testified that he was stopped by Respondent on the 105th Street subway platform. Respondent removed a backpack Mr. Turner was carrying and handed it to another officer (T. 20). Respondent asked him whether he had anything in his pockets which would stick him and threatened if he was stuck, he would be upset (Id.). Mr. Turner told him that he had no sharp objects in his pants. Respondent then searched

him, removing a sum of currency and a wallet (Id.). Respondent then searched Mr. Turner's backpack, seizing a quantity of prescription pills (T. 21). Respondent then returned the items to Mr. Turner and released him.

Respondent testified that he received a radio message from someone on his SNEU team indicating that Mr. Turner had been observed making a drug sale; specifically, selling pills (T. 34). Based upon that information, he moved in with the apprehension team to detain Mr. Turner (Id.). Respondent never saw Mr. Turner engage in what he believed to be a drug transaction but relied on the positive report from his team member. Respondent was further unable to recall the description given over the radio for the suspect who allegedly sold the drugs, other than it was "the guy who walks with the cane." Respondent questioned Mr. Turner, asking him "Do you have the pills?" (T. 34). According to Respondent, Mr. Turner then gave him the pills (T. 35, 49).

Respondent then learned that the other portion of the apprehension team was unable to apprehend the alleged buyer (T. 35). Based upon the absence of additional evidence and the fact that the prescription was in Mr. Turner's name, Respondent released him (T. 36).

In assessing the credibility of witnesses, the tribunal considers many factors, among them, the witness's: (1) ability to have perceived the facts which are the subject of his testimony; (2) motive to lie; (3) interest in the outcome of the litigation; (4) bias for or against a party to the litigation; (5) prior statements which may be inconsistent with his testimony before the tribunal; and (6) criminal or bad conduct (*New York Criminal Jury Instructions, 2d ed., Credibility*).

In support of their case, CCRB also offered the testimony of Mr. Joseph McClure, an associate of Mr. Turner's who was in the subway station that morning. Mr. McClure testified to a separate encounter with Respondent which occurred near the same time. While I found the testimony of Mr. McClure generally credible, the evidence which he offered the tribunal with respect to this incident had such minimal probative value that it was irrelevant. Mr. McClure's incident did not appear to be related to Mr. Turner's scenario except for a common alleged actor: Respondent. Accordingly, I disregarded it in its entirety and it played no part in my findings or recommendation.

Mr. Turner is a recovering heroin addict with several criminal convictions. While he is not rendered incompetent to testify by virtue of his narcotics addiction, the addiction and his criminal history are legitimate considerations in making a credibility determination. Nevertheless, Mr. Turner was specific and detailed in his description of his interaction with Respondent. While his description of the circumstances was not corroborated by another witness, it stands on its own merits as a forthright recitation of fact and I credit his testimony.

While Respondent's assertion that Mr. Turner provided the bottle of pills on his own volition strains credulity, when combined with his inability to recall much of what transpired before Mr. Turner's supposedly voluntary proffer of the pill bottle, it leads me to conclude that his testimony regarding the voluntary proffer was self-serving and tailored to overcome constitutional limitations.

As a general matter, a police officer is entitled to "act upon the strength of a radio bulletin or a telephone or teletype alert from a fellow officer or department and assume its reliability" (People v. Lypka, 36 NY2d 210, 213 [1975]). Once the basis for the initial

action is challenged, however, the proponent of the evidence must demonstrate that the officer or agency which sent the information possessed the necessary cause to support the police action (People v. Lypka, 36 NY2d 210, 214). In this case, crediting Respondent's testimony that he received a radio communication from the observation post indicating that "the guy with the cane" sold pills to another individual, I find that his action in stopping Mr. Turner was presumptively authorized. I further find that the pat-down of Mr. Turner's pockets was reasonable and authorized under the circumstances. I will not address the legality of the subsequent search of Mr. Turner's pockets because the alleged misconduct in this case is explicitly focused upon the search of Mr. Turner's backpack.

The protections embodied in Article I, section 12 of the New York State Constitution, however, serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects, such as bags and other containers. The New York Court of Appeals has held that the search of a closed container, without the presence of an emergency or exigent circumstances is *per se* unreasonable and unconstitutional. In People v. Jimenez, the court noted that all warrantless searches are presumptively unreasonable (22 NY3d 717 [2014]). Even where a search occurs incident to an arrest, a warrantless search may be justified only where there is an exigency interest to protect the safety of the officer or prevent the destruction of evidence. Still, even a bag that is within the immediate control or grabbable area of the suspect may not be subjected to a warrantless search unless the circumstances support a reasonable belief that the suspect may gain control of a weapon in the bag or destroy evidence (see, People v. Gokey, 60 NY2d 309 [1983][finding that where defendant was arrested for trespass, the fact that her purse appeared heavy did not support a reasonable belief that it contained a

weapon or evidence of a crime even where police officers were investigating burglaries in the area]).

This inception of this encounter, as related by Mr. Turner, seems entirely plausible in view of what one would expect the typical SNEU enforcement action to look like. In this case, however, Respondent's actions went beyond what would have been legally permissible and strayed into a full-blown search without benefit of a search warrant or circumstances supporting an exception to the warrant requirement.

There is no evidence in the record that Respondent had a warrant to search Mr. Turner's backpack. Mr. Turner was not arrested (though he could have been), so this alleged search could not be categorized as a search incident to lawful arrest. Respondent did not attempt to articulate any allegedly exigent circumstances surrounding the encounter. Respondent was unequivocal in his testimony that he never sought, nor was he given, Mr. Turner's consent to search his backpack. Thus, none of the three previously discussed exceptions to the warrant requirement apply. It would be difficult under these circumstances to find that Respondent's search of the backpack, in the absence of a search warrant, exigent circumstances or Mr. Turner's consent, was reasonable.

Unfortunately, Respondent's testimony provided little, if any, support for his actions beyond his receipt of the radio communication from the observation post. I found his testimony vague and often contradictory. Respondent made repeated factual assertions regarding what his team "usually" did; it was only after admonitions from the tribunal that he recalled a few pertinent facts about his interaction with Mr. Turner on the date in question. In making this determination, I am mindful that the event under review

occurred over two years ago. I am also aware that since Mr. Turner was not arrested, the quantum of official police paperwork ordinarily associated with an arrest was not generated.

Despite these mitigating factors, Respondent's testimony fails to set forth any facts supporting an exigency search of the backpack. By his own testimony, Respondent made it clear that he neither sought nor received Mr. Turner's consent to search. In describing the encounter in this manner, the only available scenario under which discovery of the pills would not be problematic for Respondent was one where Mr. Turner voluntarily handed the pills to him. This assertion is implausible, given that Mr. Turner, as a person who has been arrested and convicted of drug crimes in the past, is far from naïve and extremely unlikely to have simply handed suspected contraband to a police officer.

Considering all the credible evidence in the case, I find that Respondent did search Mr. Turner's backpack and that he lacked sufficient legal justification for doing so. Even in the face of such a finding, however, such finding alone does not necessarily render the officer's conduct sanctionable. We have held that improper police action is punishable only if an officer acted "with knowledge that he was [acting] improperly, acted without concern for the propriety of his actions, or acted without due and reasonable care that his actions be proper." *Police Department v. Ortiz, OATH Index No. 1626/97, report and recommendation at 10-11 (Nov. 19, 1997) modified on penalty, Comm'r Decision. (Feb. 3, 1998); Police Department v. Hoffman, OATH Index Nos. 1005-06/98 (Apr. 13, 1998); Police Department v. Wang, OATH Index No. 657/98 (jan. 12, 1998).* For the reasons already set forth above, CCRB has proven that Respondent's

conduct was careless and that a reasonable police officer would not have acted similarly under the circumstances.

Accordingly, I find Respondent Guilty of the Specification.

Disciplinary Case # 12814-2014

In this case, Respondent is charged with stopping, frisking, and searching John Turner on August 15, 2015, without sufficient legal justification. All of the facts relating to the specifications on this case are disputed by Respondent, inasmuch as he claimed not to have stopped Mr. Turner that day.

John Turner and Joseph McClure testified for CCRB in their direct case. Respondent testified on his own behalf. Police Officer Quentin Saxon testified as a rebuttal witness.

Mr. McClure testified that he met his friend, John Turner at approximately 0730 on August 15, 2013, in the vicinity of the 105th Street "L" subway station, near the methadone program which both men participated in. Mr. McClure advised him that he was on his way into his drug program; Mr. Turner agreed to wait for Mr. McClure and then to take the train together afterward. Mr. McClure obtained his methadone from the drug program then met up again with Mr. Turner at the subway turnstiles. Messrs. McClure and Turner entered the platform area and proceeded to an "observation deck" area to wait for their train (T. 66). As a train approached, Mr. McClure and Mr. Turner proceeded downstairs to the subway platform (T. 67). Before they could board the train, they were stopped by members of Respondent's SNEU team, including Respondent (Id.). Mr. McClure was asked "where do you think you're going?" (Id.). Mr. McClure was asked "where are the drugs?" to whicb he replied that he had no idea what the police were talking about (T. 68). Mr. Turner was standing next to him at this point (Id.). The

police officers then directed him, along with Mr. Turner, to return to the observation deck level with them (T. 69).

Once on the observation deck level, a police officer conducted a pat-down of Mr. McClure's clothing while Respondent taunted him by calling him "white boy" and a drug dealer (T. 69-70). The police found no evidence on his person but handcuffed him nevertheless (T. 70-71). When Mr. McClure protested, saying, "We went through this last week," he was told that he was "going downtown" (T. 71). Mr. McClure recalled Respondent telling him, "I don't know what you're talking about; I've never seen you before" (Id.). Mr. Turner was at the opposite end of the observation deck area while this was going on (T. 72). After he had been detained for approximately 15 minutes, the handcuffs were removed and he was permitted to leave the area (T. 73).

Mr. Turner's testimony regarding the circumstances of his encounter with Respondent that day is essentially identical to, and corroborative of, Mr. McClure's but adds certain facts relevant to the charges. Once both men were taken up to the observation deck level, Mr. Turner and Mr. McClure were taken to opposite ends of the platform (T. 84). Respondent then directed Mr. Turner to remove a backpack he was carrying, which Mr. Turner then placed on the ground (Id.). Respondent conducted a pat-down of Mr. Turner's pockets (Id.). Respondent asked Mr. Turner if "there [is] anything sharp in there," then searched through his pockets (T. 86). When Respondent did not find anything of evidentiary significance, he asked Mr. Turner, "This is all you've got?" (Id.). Respondent then picked up the backpack Mr. Turner had placed on the ground and searched inside it (T. 87). After Respondent had searched Mr. Turner's backpack without seizing any evidence, he moved over to Mr. McClure (Id.). Mr. Turner observed Mr.

McClure becoming somewhat agitated, to which Respondent stated "Cuff that son of a bitch" (T. 88). Respondent then turned toward Mr. Turner and told him, "Get the f--k out of here" (Id.).

Though Respondent did not explicitly challenge the veracity of CCRB's witnesses in his testimony, the thrust of his defense of the specifications in this case was that both witnesses fabricated the August 15th incident, as he repeatedly denied stopping either Mr. McClure or Mr. Turner on that date. Respondent persisted in this denial even after conceding on cross-examination that he would not be surprised to learn that Police Officer Saxon had given CCRB a statement indicating that he had stopped Mr. McClure at that date and time and that Respondent was standing next to him while he did it.

Police Officer Quentin Saxon, called as a rebuttal witness, testified that he was on duty on August 15, 2013, assigned to Respondent's SNEU team (T. 131). Police Officer Saxon stopped a man later identified as Joseph McClure on the street level of the 105th Street subway station, then brought him up to the upper level of the station (T. 133, 155). Police Officer Saxon did so because he was directed by Respondent to stop a white male with brown hair in a ponytail, a description which fit Mr. McClure (T. 134, 147). Although Mr. McClure was stopped, he was not arrested and was subsequently released on Respondent's order (T. 136). Police Officer Saxon recalled focusing his attention on Mr. McClure after receiving a radio communication from Respondent but did not observe him engage in any activity other than standing near a truck (T. 158-159).

Based upon the credible evidence in the record, I find that Respondent stopped, frisked, and searched John Turner, all without sufficient legal authority.

I credit the testimony of Police Officer Saxon as having the ring of truth. He testified in a logical, forthright manner consistent with that of a witness lacking bias. Despite the passage of a significant amount of time, he was able to recall important details about his encounter with Mr. McClure which lend credence to his account. His testimony corroborates Mr. McClure's testimony in two important respects: (1) that Respondent was, in fact, present at the 105th Street subway station that morning; and (2) that Respondent was standing next to him when Police Officer Saxon conducted a pat-down of Mr. McClure's clothing.

Although there are factors suggesting that Mr. Turner's and Mr. McClure's respective testimonies should be carefully scrutinized, none of these infirmities are sufficient to overcome the striking consistency of their respective testimonies, not only with each other's, but also with Police Officer Saxon's. As set forth above, both men are recovering heroin addicts. Mr. McClure conceded that he takes prescription medication which sometimes affects his memory (T. 75). Mr. McClure described Respondent in a previous out-of-court statement as being five feet tall but later admitted that he had done so to mock Respondent (T. 76, 78). Mr. McClure was certain that Respondent and his team had stopped him twice, first on July 25th and the second time on the date in question (T. 77-78).

Police Officer Saxon corroborated the substance of Mr. McClure's testimony, in that he confirmed that Mr. McClure was stopped by Respondent's SNEU team on August 15th, if not by Respondent himself. Police Officer Saxon further corroborated Mr. McClure's release, based upon the absence of any evidence suggesting that he had committed a crime. Accordingly, I credit Mr. McClure's testimony.

Police Officer Saxon's testimony corroborated the factual assertions made by Mr. McClure and Mr. Turner, that Mr. McClure was stopped that day in the subway station by members of Respondent's team, in direct contradiction to Respondent's testimony. Mr. McClure's testimony, in turn, corroborates Mr. Turner's testimony, since both men were stopped at the same time, within sight of each other, by Respondent and his team. Although the details of Mr. Turner's stop, frisk, and search come solely from his own testimony, the rest of his testimony was corroborated by that of Police Officer Saxon and Mr. McClure, as set forth above. As such, I infer from that portion of his testimony relating to the events leading up to his stop, which I credited above as truthful, that the remaining portion of his testimony is more likely believable than not. Accordingly, I credit Mr. Turner's testimony as trustworthy.

Mr. Turner described how Respondent checked his pockets, then searched a bag he had been carrying on his shoulder. At no point in time did Respondent find any evidence in Mr. Turner's possession supportive of an accusation of drug possession or distribution.

The most charitable assessment this tribunal can make of Respondent's testimony is that he was honestly mistaken in his belief that he did not encounter either Mr. McClure or Mr. Turner on August 15th. Assuming that to be the case, his testimony is not helpful when considered with, and against, the body of evidence in the record.

Based upon all the credible evidence in the record, I find that Respondent did, in fact, supervise the stop of Mr. Turner. I further find that Respondent engaged in a pat-down and subsequent search of Mr. Turner's pockets, then searched Mr. Turner's

backpack, all without sufficient legal justification. Accordingly, Respondent is found Guilty of the three Specifications.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974).

Respondent was appointed to the Department on January 10, 2005. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB recommends the forfeiture of 15 vacations days Case #2014-12809 and a forfeiture of 15 vacation days for Case #2014-12814, for a total of 30 vacation days as the appropriate penalty for the alleged misconduct in all four specifications. However, I find that a lower penalty is more befitting in this case. Accordingly, I recommend the forfeiture of 7 vacations days as the appropriate penalty for the above two charges. This is consistent with prior penalties for stops and searches without legal authorization. *See Disciplinary Case No. 2013-9653 & 2013-9654, signed February 19, 2015* (two eight-year members of the service forfeited three vacation days each for stopping, frisking, and searching a complainant without sufficient legal authority); *Disciplinary Case No. 2013-10271, signed May 27, 2015* (eleven-year detective with one prior adjudication forfeited three vacation days for frisking a complainant and subsequently searching his bag without sufficient legal authority); *Disciplinary Case No. 2013-9865, signed March 27, 2015* (eight-year detective forfeited five vacation days for stopping and searching a complainant without sufficient legal authority).

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner – Trials

APPROVED

FEB 22 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT ABRAHAM BADILLO
TAX REGISTRY NO. 936162
DISCIPLINARY CASE NO. 2014-12809 & 2014-12814

In his last 3 performance evaluations Respondent had received an overall rating of 4.5 "Extremely Competent/Highly Competent" in 2014, and a 4 "High Competent" in both 2013 and 2012. [redacted]

Respondent has been the subject of one prior adjudication. In 2010, he was charged with failing to immediately notify the desk officer and request the response of a patrol supervisor after a handcuffed individual escaped from a Department vehicle. He pled guilty to the charged misconduct and forfeited 32 pre-trial suspension days. Additionally, Respondent was placed on Level 1 Force monitoring in 2009 and Level 2 Discipline monitoring in 2010.

Respectfully submitted,

Paul M. Gamble
Assistant Deputy Commissioner – Trials